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IN THE SUPREME COURT OF THE STATE OF IDAHO

JOHN M. McVICARS and JULIE McVICARS, husband and wife, Plaintiffs/Respondents, v. BRET B. CHRISTENSEN and EDDIEKA B. CHRISTENSEN, husband and wife, and BAR DOUBLE DOT QUARTER HORSES, LLC, an Idaho limited liability company, Defendants/Appellants.	Docket No. 38705-2011 APPELLANTS' BRIEF

Appeal from the District Court of the Second Judicial District for Nez Perce County

THE HONORABLE CARL B. KERRICK, DISTRICT JUDGE, PRESIDING

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TABLE OF CONTENTS

I. STATEMENT OF THE CASE 1

i. Statement briefly indicating nature of case 1

ii. Course of the proceedings in the trial and its disposition 1

iii. Concise statement of the facts 2

II. ATTORNEY FEES ON APPEAL 2

III. FACTUAL DISCUSSION 2

IV. ARGUMENT 25

V. LEGAL ARGUMENT 27

VI. DISCUSSION OF ISSUES PRESENTED ON APPEAL 34

A. That the District Court erred when it concluded and ordered that the Christensens' use of their property west of the McVicars' home constitutes a private nuisance, and in addition that the Right to Farm Act and the clean hands doctrine to not apply.

B. That the District Court erred when it ordered the Christensens to relocate their building and centralize their horse operation at a different location upon their property, said remedy is in error given the applicable facts and law.

C. That the District Court erred when it ordered that the Christensens limit traffic on the property west of the McVicars' property and that the only vehicles which are personally owned by the Christensens may drive on the property that lies west of the McVicars' property, and in addition that the Right to Farm Act and the clean hands doctrine do not apply. In addition, said remedy is in error given the applicable facts and law.

D. That the District Court erred when it ordered a mandatory injunction requiring the Christensens to remove the fabric building from its current location on Christensens' property by no later than August 1, 2011 and in addition that the Right to Farm Act and the clean hands doctrine do not apply. In addition, said remedy is in error given the applicable facts and law.

E. That the District Court erred when it did not find that the McVicars should reimburse the Christensens for their attorney fees and costs incurred in regard to the successful defense of the public nuisance claim and the issue of the building being unsafe or a fire hazard, i.e., its structural integrity and that it did not meet the applicable building code; of which fees and costs associated therewith are recoverable

VII. CONCLUSION 37

TABLE OF CASES AND AUTHORITIES

Cases — Page(s)

Corp. of Presiding Bishop of Church of Jesus Christ of Latter Day Saints v. Ashton, 92 Idaho 571, 448 P.2d 185 (1968) 28

Crea v. Crea, 135 Idaho 246, 16 P.3d 922 (2000) 28

Hansen v. Indep. Sch. Dist. No. 1 in Nez Perce County, 61 Idaho 109, 98 P.2d 959 (1939) 28

McNichols v. J. R. Simplot Co., 74 Idaho 321, 262 P.2d 1012 (1953) 28

Payne v. Skaar, 127 Idaho 341, 900 P.2d 1353 (1995) 28

Sweet v. Ballentine, 8 Idaho 431, 69 P. 995 (1902) 28

Statutes and Other Authority

Idaho Code § 22-4501 31

Idaho Code § 22-4502 31-33

Idaho Code § 22-4505 33-34

STATEMENT OF THE CASE

i. Statement briefly indicating nature of case

The nature of this case is fairly singular. The primary issue before this Court is whether or not the use made by the Christensens of their property, which is lawful in all respects and consistent in their usage with the land in the surrounding area, is nevertheless a "private nuisance" because of the objection by the McVicars. The McVicars (respondents herein and plaintiffs below) brought a claim against the Christensens (appellants herein and defendants below) alleging that the building the Christensens constructed on their property was in violation of building codes and fire codes and constituted a safety threat to others. They also brought a cause of action alleging a public nuisance. Said allegations were denied by the underlying court.

ii. Course of the proceedings in the trial and its disposition

The matter was tried for approximately five (5) days before the Honorable Carl B. Kerrick without a jury. Prior to the trial, the trial court asked both counsel to present the factual and legal issues they felt were before that court. After the trial, the trial court requested written closing arguments. Counsel having complied with the trial court's request, Judge Kerrick then rendered his Findings of Fact, Conclusions of Law, and Order which was then reduced to a judgment upon which this appeal is taken.

iii. Concise statement of the facts

The Christensens' use of their building, the treatment and care of their animals, and the usage of their property West of the McVicars' property are totally consistent with an agricultural use of property, which is the personality and character of the property throughout the Tammany Creek area and is actually embraced by the community members of that area.

The McVicars did not like the size or location of the building in question but that should not define what a nuisance is under the facts of this case.

ATTORNEY FEES ON APPEAL

The Christensens hereby request their attorney's fees and costs associated with this appeal. Idaho Appellate Rules 40 and 41 and Idaho Code section 12-121 contemplate that such an award should go to the prevailing party when the other party has acted unreasonably and without foundation. The following factual discussion supports said position.

FACTUAL DISCUSSION

The Christensens and their family have a love of horses, and they sought out a home with acreage so they could raise their five children in a rural setting whereby they could be involved in an experience with farm animals. They located to a home and acreage outside of the city limits of Lewiston, Idaho; the property in question in the Tammany Creek area which borders the city of Lewiston from Hells Gate State Park to the Lewiston Roundup Rodeo grounds, which area consists of rodeo arenas, riding arenas, homes, stabling of horses, farmland, etc. As the trial court noted in its Findings of Fact, Conclusions of Law, and Order:

14. Bret and Eddieka Christensen purchased the Kaltenbaugh property in 2003. The Christensens were drawn to the Tammany Creek area primarily because it is a rural area known for properties with horses. They wished to raise horses on their property. The Christensens operate a limited liability company known as Bar Double Dot Quarter Horses. *Plaintiffs' Exhibit 290.* The Christensens' main focus of ranching is raising horses, but they also maintain a cattle herd which is located offsite.

R Vol. II, p. 235, ¶ 14 (emphasis added).

The property in question is surrounded and immediately adjacent to farmland on the western and southern borders. Across the street in one direction from the property in question is the rodeo grounds and in another direction is an outdoor riding arena, both of which caters to various riding events, in an open setting, from morning into the evening, that are attended by the public at various times throughout the year. The trial court found in its Findings of Fact, Conclusions of Law, and Order the following:

Characteristics of the Tammany Creek Area

1. The Tammany Creek area is known as a rural farm-type community, where homes and agriculture coexist. Many of the residences have outbuildings, barns, outdoor riding arenas, and livestock. The ownership of horses is common in this area.

2. Tammany Creek, and the properties associated with this lawsuit, are zoned Agriculture-Residential by the Nez Perce County Zoning Ordinance. *Defendants' Exhibits Q and R.*

3. The Lewiston Roundup grounds are located in Tammany Creek. The Roundup grounds contain a large outdoor arena, stalls, and other associated buildings. The Roundup grounds are located some distance east of both the Christensen and McVicars homes, and can be seen from both residences. The Roundup grounds were in place prior to either party living in the area. The outdoor arena at the Roundup grounds is surrounded by large outdoor lights

and the venue has a speaker system utilized for events. A variety of events are held on the premises, including the Lewiston Roundup Rodeo, motorcycle races, and demolition derbies.

4. Another well known outdoor arena in the Tammany Creek area is the 49ers Club. This facility is a small outdoor arena that is located some distance to the north of the Christensen's residence. The 49ers Club utilizes outdoor lighting and a speaker system for announcing at events. Youth rodeo events and other horse riding related activities are held at the 49ers Club arena. The 49ers Club outdoor arena is significantly smaller than the Lewiston Roundup grounds outdoor arena.

R Vol. II., pp. 231-232 (emphasis added).

Both the Roundup grounds and Lucky Acres have been in place for well over twenty-five years. Tammany Creek has grown up around these facilities.

R Vol. II, p. 239, ¶ 29 (emphasis added).

The Christensens purchased the home from Dr. Orie Kaltenbaugh who had used the property for the sheltering of approximately 50 llamas, over 25 Texas longhorn steers, 4 horses, emus, and wallabies. The trial court noted in its Findings of Facts, Conclusions of Law, and Order:

16. Initially, the Christensens' horse operation involved pasturing fifty head of horses in the area adjacent to Plaintiffs' property. The Defendants placed feeders in this area. Their use of the area was consistent with the Kaltenbaughs' use; however it was more substantial than Dr. Kaltenbaugh's agricultural activities. The McVicars testified the initial use of this pasture was not an intolerable or inappropriate use.

R Vol. II, p. 236, ¶ 16 (emphasis added).

The McVicars' home and land have detached buildings nearby which were used to centralize their construction business. R Vol. II, p. 234, ¶¶ 10, 11 - Findings of Fact, Conclusions of Law, and Order.

When the Christensens were purchasing their property in 2003, there was a building owned by Dr. Kaltenbaugh which was intended to be included in the sale to the Christensens, however, the McVicars desired ownership of the same. The building was located between the McVicars' property and Dr. Kaltenbaugh's property. More specifically, the building was located directly behind the home and garage area of the property purchased by the Christensens. Ultimately, the building was sold to the McVicars rather than the Christensens, and soon thereafter the McVicars initiated a granite cutting business therein. The building and land was used by the McVicars for the cutting of the granite and the commercial sale of the granite. *Id.* The trial court stated in its Findings of Fact, Conclusions of Law, and Order as follows:

> 7. On the north-east corner of the property, the McVicars have a large garage/shop and also a pole building shop. *Plaintiffs' Exhibits 1-2,* John McVicars operated his general contracting business, McVicars Construction, from the garage/shop. Mr. McVicars employed from one to five employees who would meet at the garage/shop . . . .

R Vol. II, p. 233, ¶ 7.

> 13. From 2003 to 2008, the focus of McVicars' business shifted away from new home construction and remodeling work to predominantly custom granite design. In 2008, the McVicars decided to relocate their granite operation, in part because the business was expanding. However, the decision to relocate was also predicated upon concern that the location of the granite shop (footnote omitted) might interfere with resolving the matter currently before this Court.

R Vol. II, p. 235, ¶ 13.

Dr. Bret Christensen desired a building where he could train his horses. R Vol. II, p. 236-237, ¶ 20 - Findings of Fact, Conclusions of Law, and Order. He checked with the appropriate

officials and applied for a Siting Permit for an agricultural building. The Nez Perce County Siting Permit states:

> **SITING PERMITS ARE FOR AGRICULTURAL BUILDINGS ONLY** as described in the 2000 International Building Code, Chapter 2, Section 202, Definitions: "A structure designed and constructed to house farm implements, hay, grain, poultry, livestock or other horticultural products. This structure shall not be a place of human habitation or a place of employment where agricultural products are processed, treated or packaged, nor shall it be a place used by the public."

See Defendants' Trial Exhibit A; *see also* Findings of Fact, Conclusions of Law, and Order, R Vol. II, p. 236, ¶ 18.

The trial court stated in its Findings of Fact, Conclusions of Law, and Order:

> 31. The Christensens elected to place the building at the southernmost point of their property to maximize the beneficial use of their property. Dr. Christensen testified that there was no animus, ulterior motive, or intent to disturb the McVicars when they decided on placement and construction of the building.

R Vol. II, p. 239-40, ¶ 31 (emphasis added). As noted by the trial court, the placement envisioned by the Christensens was done to "maximize the beneficial use of their property" but the Christensens still conferred with the McVicars.

Dr. Christensen conferred with the McVicars and actually took Mr. John McVicars to the specific location he had in mind for his building and showed him where the intended corners of the building would be located so that the size and dimension of the building could be fully visualized. *See* Tr Vol. II, p. 1073, L. 25; p. 1074, LL. 1-25; p. 1075, L. 1-5.

Q. Just fill us in on the details as far as --

A. Okay. Well, after we researched ail of the stuff about the arena and how -- you know, where we'd have to lay it out -- and we did -- I mean, one of the things that I've -- I've seen in the -- in the dealings between lawyers is, you know, why did we put it there versus put it right down in the front pasture. Well, you can't put it down in the front pastures because there's power lines down there. That's illegal. You can't put a building of that size underneath power lines. The power company won't allow you to do that.

And also, the amount of excavation that would be required to -- I mean, there's a -- there's a big drop between -- in the front pastures from -- if you try to put it one way versus the other way, the excavation costs would be just tremendous.

So, the flattest place -- flattest part of our property was back there behind the McVicars. And so, that's -- that's why we chose to put it back there.

And in -- in placing it, we tried to push it as far back as we could so that the front of the arena wouldn't be directly behind their house. And when you go out to the arena, the front of the arena is, it's -- it's up just a little bit from their house. It's not directly -- if you're looking straight out the windows, they can see it. I've seen the pictures. You can see it off to the side. But we tried to push it back as far as we could.

Q. And then the conversation with John McVicars?

A. What I did is I –

Q. When and where?

A. It was in 2005, probably the fall. And I know it was close to nighttime, and I don't know the date of it or anything like that. But I wanted to, you know, let John know that we were -- we were thinking about this.

And so, I went out there, and I set up panels that you can put pens in together. And I set them up and I took measurements, and I set them up in four different areas to show what the perimeter of the arena would be. And -- and I did tell him at that time that it was going to be a Coverall arena. You know, I don't -- I don't think -- I

don't ever remember saying this is going to be an outdoor arena. It was a Coverall arena. And so, he didn't –

Q. So, back to the -- part of the answer is in regards to the -- you're saying these pens. What else -- did you mark off the corners of the building?

A. Yeah, the corners of the building and where -where they were going to be placed, where the building was going to be placed.

Q. Okay.

A. And so, you know, I told him -- he didn't seem to have a big concern about it, and –

Tr Vol. II, p. 1072, LL. 22-25; p. 1073; p. 1074, LL. 1-24 (emphasis added).

Due to the location of the building being on a flat area in proximity to the McVicars' property, it was important to the Christensens to have a covered building in order to minimize the impact upon the McVicars and others. The trial court stated in its Findings of Fact, Conclusions of Law, and Order:

21. John McVicars testified that in 2006 he and his wife observed a significant amount of construction occurring in the pasture behind their home, including the shifting of dirt and the eventual placement of a cement foundation. Both John and Julie testified they believed their neighbors were constructing an outdoor riding arena, which was typical in the Tammany Creek area. The Plaintiffs even allowed construction crews to pass over the pasture south of their home in order for the construction crews to more easily access the Christensens' arena.

R Vol. II, p. 237, ¶ 21 (emphasis added).

By having the building totally covered, it would prevent the dust that would inevitably be kicked up from drifting to the McVicars home or yard when training horses and moving other

livestock. It would also minimize the impact of any type of exterior lighting from an open arena on the McVicars, because the lighting would now be contained within the building. It should be noted that the McVicars have never complained about any type of dust escaping from the building in question and landing upon their property in some manner.

The Christensens sought to sell hay from their premises in order to provide hay to the local farmers, ranchers, and individuals with livestock in the immediate area. The Christensens applied for a permit with Nez Perce County, and they were advised that they did not need such a permit, but at a later date they were told they needed a permit. The trial court found:

> 73. On July 9, 2009, Mr. Rockefeller informed the Christensens that a conditional use permit was required for the sale of all agricultural items not grown on their property. *Plaintiffs' Exhibit 288*. The County issued a conditional use permit for the sale of hay to the Christensens on June 1, 2010. *Defendants' Exhibit K*. Mr. Rockefeller testified that other individuals in the Tammany Creek area also sell hay to the public. Frank Dillon, another resident of the Tammany Creek area testified that he sells 1,000 to 2,000 tons of hay per year from his barn.

R Vol. II, pp. 251-252, ¶ 73 - Findings of Fact, Conclusions of Law, and Order, *see also* Defendants' Exhibit L.

The McVicars appealed the decision to grant the Christensens their conditional use permit to the Nez Perce County Commissioners who then held a public hearing on their complaints.

It should be noted as reflected in Defendants' Trial Exhibit K, which is the McVicars' petition to the District Court for review of the Decision of the Nez Perce County Commissioners, Exhibit A thereto, which specifically addresses the dust issues and the impact of hay sales as to the

McVicars. The County Commissioners held a public hearing on the McVicars' appeal of the Conditional Use Permit as issued to the Christensens. The Commissioners considered "all information, oral or written, that was received at the time and place of the public hearing as presented by the Appellant, the Applicant, and other interested persons." They considered the Nez Perce County's Comprehensive Plan which states as its goal "is to retain a strong agricultural land use base to support the agrarian economy and protect the rural character of Nez Perce County."

The Commissioners then modified the permit to the Christensens upon the following conditions:

> *a. Annual application of dust abatement to the drive-way that is situated between the two parcels leading to the building.*
> *b. Proof of purchase and proof of application for the dust abatement provided to Nez Perce County Planning and Building and kept on file with the Conditional Use Permit.*
> *c. Limited hours of hay sales operation to Monday through Saturday, 7 am to 7pm, with no delivery or sale of hay on Sundays.*
>
> 5. Any violation of the conditions and terms of the Conditional Use Permit may result in the revocation of the Conditional Use Permit to sale hay on this property.

See Defendants' Trial Exhibit K, Exhibit A, pp. 3-4.

The beauty of the building in question is that the doors to the building were large enough so that if a truck full of hay was delivered, the truck could be taken into the building to contain any type of dust or hay debris (for lack of a better term) within the confines of the building. This was also true with any traffic from individuals who picked up hay. If they needed to load the hay onto a truck

or vehicle of their choosing, it could be accomplished within the confines of the building. R Vol. II, pp. 248-249, ¶ 62 - Findings of Fact, Conclusions of Law, and Order.

At trial testimony was given by neighbors and individuals throughout the Tammany Creek area concerning their observances of the Christensens' property at various times over the years.

A sampling of the testimony as a whole, shown below, clearly established that the Christensens kept their property in immaculate condition, and they were very conscientious about how they tended to not only their property but their animals:

- **Morla Moser**, a resident of the Tammany Creek area and a horse owner.

> Q. Okay. And then I'm just asking, could you give us your -- your -- in 2006, 2007, break it down any way you want, your perception of the premises, the Christensens' premises. I'm talking about your perception of them -- of it as far as cleanliness, upkeep, that type of thing.
>
> A. He made quite a few improvements from -- that I saw, starting when -- after he bought it, as far as fencing and ground and put a lot of work into it. It was very well kept up. When you have horses like he does, you got to kind of keep stuff in line and nice so they don't get hurt and so forth.

Tr Vol. II, p. 730, LL. 21-25; p. 731, LL. 1-7.

- **Frank Dillon**, a resident of the Tammany Creek area and runs a horse business from his home.

> A. Okay. Well, I -- I was there, oh, a couple years ago. And, you know, it looked above average for anybody that had that much stock. And he had -- his fencing was extremely good. His grounds were clean. His pastures were clean. I mean, it's -- there's nothing that I observed that -- that I thought should be changed as far as livestock and, you know, facilities are concerned. I was there a time or two in the last year, and pretty much the same thing.

I know that he came and borrowed my trailer to haul some manure because his manure pile was getting a little high, and he wanted to get it hauled before it got too much. And he borrowed a trailer for a little while, and then bought his own trailer right after that.

And so, I'd -- I'd say, as compared to what the rest of the area is concerned, is it's average or above average.

Tr Vol. II, p. 823, LL. 2-18.

- **Charles Lamm**, a resident of the Tammany Creek area and horse owner.

A. I went to Mr. Christensen's to get hay, pulled through the gates and went out to the barn. As to the condition of the property?

. . . .

A. Probably, to sum up my observations, it's probably one of the cleanest, tidiest, most organized ranch, small farms that I've been on. . . .

. . . But actually, probably one of the most organized and well-cleaned horse stables, ranches that I've been on.

Tr Vol. II, p. 830, LL. 21-23; p. 831, LL. 1-3, 13-15.

- **Tammy Long**, a resident of Clarkston who has been to the Tammany Creek area, specifically the Christensens' property, and whose daughter owns goats.

A. When you drive to Dr. Christensen's going Tammany Creek Road, you see various different layouts of stables and stuff. Out of any of them, I would say that Dr. Christensen's is laid out pretty simply, and yet clean and in an appropriate manner.

. . . .

A. Okay. You -- you do not see any piles of manure laying around that you could tell would obviously be for a long period of time. There -- if there are any, it would probably be where a horse had just walked by and excreted. I -- I did not see any large piles at all.

Everything is -- is clean. And there's -- even the stalls, when you walk by the stalls, you don't smell a horse smell. You don't really smell a livestock smell out there.

Tr Vol. II, p. 841, LL. 19-23; p. 842, LL. 10-18.

- **Joe Smith**, a resident of the Lewiston orchards who is very familiar with the Tammany Creek area, specifically the Christensens' property, and is in the horse business.

A. Oh, yeah. I would think it was -- it's very consistent with the -- the other residences. You know, there's -- several people have arenas at their home, you know. Other people have indoor arenas too, just -- so, I would think it would be very consistent with that.

. . . .

A. Well, I think it has to do with just the rural setting, you know, just being out there. I mean, that's where you would -- if you wanted to do that, that's where you would go.

I, myself, actually own property next to what's now known as Rockin Y for several years. And that was our intent to do that. Actually, what happened is we sold it to the Johnsons. But that was my intent, to do the same thing.

Q. What's Rockin Y?

A. That's the facility on down the creek with the old Lucky Acres facility. It's an indoor arena. They do concerts and shows, ropings, basically all the same things they do at the Roundup Grounds.

Tr Vol. II, p. 851, LL. 13-17, 22-25; p. 852, LL. 1-10 (emphasis added).

- **Paula Pintar**, a resident in the Lewiston orchards and who is familiar with the Tammany Creek area, specifically the Christensens' property, and owns horses.

Q. Okay. And then when you're up there on a frequent basis, can you give your observation of the premises as far as smell, dust, cleanliness, that type of thing?

A. I don't really notice any smell when I'm up there. We just take our -- we clean our stalls, and we just take it out to where he has a stockpile. And I don't remember that ever smelling or notice -- making a note of that.

No dust. Everything's pretty much got rock. So, whether we're driving on it or just moving the wheelbarrows, we're pretty much on a rock surface.

Q. Okay. As far as the premises in general, as far as -- when we say "manure piles," there's two things, right? The poop on the ground that -- that you can start walking in, are those kind of things kept up and cleaned up regularly?

A. Yeah. It's -- yeah. If you -- on any of the roads or the walkways, or even in the pastures, you don't see a lot of manure piled up anywhere. But what we do when we do -- when we clean our stalls, we just put it into a pile. And then he'll stockpile the pile, and then the pile disappears. And I don't know where it goes. I'm assuming it gets put in pasture somewhere.

Tr Vol. II, p. 861, LL. 21-25; p. 862, LL. 1-19 (emphasis added).

- **Dale Valentine**, a Waha resident who is familiar with the Tammany Creek area, particularly the Christensens' property, and owns horses.

Q. Okay. When you've been on his premises, can you just describe to the Court in your words your observations concerning the premises, from the cleanliness, smell, noise, any dust, anything else that you want to observe?

A. I've never observed any kind of smell. You know, he has horses. You're going to get a little bit. But I mean, not a pungent odor nowhere.

Cleanliness, it's really clean. Anybody that drives by can see he's really well maintained, his pasture and, you know, all that you can see. I mean, it's a very nice looking facility. He's done extensive roadwork back to his large barn where he keeps his hay.

Other than that, I've never seen no trash or nothing anywhere, as many times as I've been out there.

. . . .

. . . -- you can't beat Bret's place. His pastures are just, you know, emaculate. He cleans them and waters them all the time. All his livestock is really well taken care of. There's -- I've never seen any dust kicked up out there, even when I've driven on it.

Tr Vol. II, p. 872, LL. 15-25; p. 874, LL. 1-4, 21-25 (emphasis added).

- **Gordon Mohr**, a Lewiston resident who is quite familiar with the Tammany Creek area, specifically the Christensens' property, and owns horses.

Q. Okay. Why would you say that?

A. Well, he keeps it nice and clean and whatnot, from what I've been around there. And actually, it's probably a little nicer setup than most of them.

Tr Vol. III, p. 900, LL. 15-18.

Consistent with the above testimony, Judge Kerrick specifically set forth in his Findings of Fact, Conclusions of Law, and Order as follows:

90. Morla Moser has visited the property since the building was constructed in 2006. She testified the property was probably maintained better than other acreage in the area. Ms. Moser purchases hay from the Christensens.

91. Frank Dillon is a neighbor from the area who has visited Christensens' property. Mr. Dillon testified the property was average or above average in comparison with other properties in the Tammany Creek area. Mr. Dillon testified he also stores and sells hay from his property, and that manure piles were common in the Tammany Creek area.

92. Charles Lamm lives to the west of the Christensens. Mr. Lamm testified he believed the property was one of the cleanest, tidiest, most organized ranches or small farms he has been on. Mr. Lamm also purchases hay from Christensens.

93. Tammy Long, a Christensen hay customer, testified the property was neat when she visited; however, most of her hay is delivered.

94. Joe Smith, a local horse trainer, also purchases hay from the Christensens. Mr. Smith compared the Christensen property to the Lewiston Roundup grounds and the 49ers Club, which are in the vicinity of the property. He also characterized the property as a high end operation that would be similar to horse boarding facilities and arenas found in larger cities. Mr. Smith testified the Christensens' property is consistent with the area because many people have riding arenas in the Tammany Creek area.

95. Paula Pintar boards a horse on the Christensen property. She testified she visits the property every day when her horse is boarded there, generally during the fall and winter. Ms. Pintar testified the property is kept neat, with manure in a pile away from the stalls. Ms. Pintar also purchases hay from the Christensens.

96. Dale Valentine is a customer who purchases hay from the Christensens. He testified that when he visits the property to purchase hay, it is a well maintained place and a nice looking facility.

97. Gordon Mohr stables his horses on the Christensen property. Mr. Mohr exercises some of Christensens' horses in trade for what he would be charged for stable rental fees. Mr. Mohr testified the property is clean and nicer than most. He also testified that he listens to the radio in the arena, and is often on the property four to five hours a day, three to five days a week.

R. Vol. II, pp. 257-258.

In contrast to the above, the McVicars, as to land usage or the impact on their property just called themselves to testify in addition to immediate family members consisting of Mr. McVicars' father and their son-in-law.

THE McVICARS MADE A VARIETY OF ALLEGATIONS

Throughout the litigation the McVicars made a variety of allegations which were either not substantiated or were contradicted by outside sources.

Noise, Animal Health Issues, and Manure

When objective people were called to testify in regard to allegations made by the McVicars concerning noise, animal health issues, and manure, the testimony by the Nez Perce County Sheriff's office and the State of Idaho, Division of Animal Industries, convinced the trial court to issue findings in relation thereto as follows:

> 48. On April 15, 2007, Julie McVicars phoned in another noise complaint to the sheriff's office at 6:11 p.m. When the officers arrived the music had been turned off. The Christensens informed the officers they had purchased a decibel meter and were testing the equipment. The Christensens stated the decibel reader measured the noise level at 70 decibels. *Plaintiffs' Exhibit 274.*

R Vol. II, p. 244, ¶ 48.

> 51. Twice when deputies responded to noise complaints, they stated that they could hear the music, but that it was not too loud or at an intolerable level.

R Vol. II, p. 245, ¶ 51.

> 68. Amity Larsen, of the State of Idaho Division of Animal Industries, visited the Christensens' property on four occasions from November, 2007 to February, 2010. Ms. Larsen is a livestock investigator and her position involves investigating animal health issues and safeguarding the health of livestock. Three of Ms. Larsen's visits to the property were due to complaints from the McVicars. <u>When Ms. Larsen inspected the property she found the facility in good repair and well maintained. The animals on the property were in good condition and health</u>.

R Vol. II, p. 250, ¶ 68 (emphasis added).

> 69. Ms. Larsen observed two piles of manure when visiting the property in April, 2009; however, she testified she did not consider the amount of manure to be large considering the amount of animals housed on the property. Ms. Larsen noted that manure could be smelled when there was a light wind, but she noted the odor was not excessive. Ms. Larsen testified she did not visit the

> property during the summer months, nor did she visit the property when pigs were present.

R Vol. II, p. 250, ¶ 69.

It is also interesting to note that the McVicars didn't complain when the land west of their property was used to pasture 55 horses with their own manure droppings, but once the building went up the smell of manure became insufferable.

Dust

The McVicars' allegations concerning dust are perplexing. Both the McVicars' and Christensens' homes and land are located in an agricultural area. The land is bordered on the West and South by farmland (that is plowed and harvested each year) that stretches as far as the eye can see (*see* Plaintiffs' Trial Exhibit No. 1). To the East of both parties' properties are the Lewiston Roundup Rodeo grounds with public parking and an outside, dirt arena. To the North is an unenclosed, dirt riding arena that operates all year-round and is open to the public. The McVicars, however, make complaint that it is the Christensens' dust that is disturbing. So, the McVicars called the Department of Environmental Quality.

The DEQ investigated and found that the dust was not "fugitive dust" and was not inappropriate given the area and the property in question. When McVicars' counsel attempted to cross-examine the DEQ agent, Mr. Clayton Steele, in regard to his testimony by presenting various photographs, Mr. Steele pointed out how the photos were actually a confirmation of his conclusion

that "fugitive dust" was not exiting from the Christensens' property onto the McVicars' property. Tr Vol. I, p. 461, LL. 17-25; p. 462, LL. 1-12.

It should also be noted that when Mr. Steele visited with Mrs. Julie McVicars upon her property, she failed to point out or denote any fugitive dust upon her property as to which she was making a specific complaint. Mr. Steele even went to the trouble of writing a letter to the McVicars which specifically stated:

> In response to your concerns, on August 1, 2008 and July 17, 2009, DEQ staff conducted an investigation at your residence to determine compliance with applicable environmental laws. During those two site visits and after reviewing pictures submitted to DEQ, it has been determined that there are no violations that occurred on your property or on the adjacent property to the west of your residence.

See Defendants' Trial Exhibit I (emphasis added).

As a matter of fact, the wildness of the McVicars' accusations were confirmed by Mr. John McVicars' testimony wherein he testified that during a windstorm dust blew from the Christensens' property onto their automobile, piling dust a quarter inch thick. It is strange to note that the record is replete with photographs taken by the McVicars and not a single photograph was taken of the quarter inch of dust on the McVicars' vehicle. Tr Vol. II. p. 1313, LL. 1-5. As a matter of fact, the pictures submitted by the McVicars to the DEQ confirmed there was no fugitive dust. Mr. McVicars then asserts all the dust came from the Christensens' property, and, thus, none from the surrounding farmland, rodeo grounds, or riding arenas.

The testimony presented at trial also revealed that the McVicars' property and the Christensens' property are surrounded by farmland which involves planting, harvesting, and tilling of the soil, both on the West of the Christensens' building and the South of the McVicars' home.

It was testified at trial that the Christensens went to significant expense by covering the ground directly behind the McVicars' home and in front of the building in question with washed rock to reduce or eliminate any dust that could be stirred up by vehicles upon their property. Thereby showing the efforts of the Christensens to satisfy or eliminate the cause for the complaints of the McVicars in this matter.

> 60. Additional gravel has been added to the roadway by the Christensens since the construction of the fabric building. A white vinyl fence was installed on the eastern boundary of the Christensens' property. These additions have not eliminated the generation of dust from the roadway. In addition, in 2010 the Christensens had arbor vitae bushes planted along the eastern side of the fabric building.

R Vol. II, p. 248, ¶ 60 - Findings of Fact, Conclusions of Law, and Order.

Water Runoff

The building was constructed in the spring of 2006 under the watchful eye of the McVicars.

Soon thereafter, the McVicars made complaint that there was water runoff from the Christensens' property due to the building. The Christensens invested a significant amount of money (*see* Defendants' Trial Exhibit E and testimony of Dr. Bret Christensen, Tr Vol. II, pp. 1111-1114, and Mr. Steve Johnson, Tr Vol. II, pp. 877-884) in order to resolve this issue. They had Mr. Johnson go along the length of the East and West sides of the building in order to construct French drains to

contain the rain that would fall onto the structure then onto the ground. The specific purpose of the French drain, as constructed by Mr. Steve Johnson who testified in detail regarding its construction requirements, was to avoid water runoff onto the McVicars' property and also to maintain the structural integrity of the building. R. Vol. II, p. 248, ¶ 62 - Findings of Fact, Conclusions of Law, and Order. During the trial, no testimony was presented by the McVicars whatsoever to contradict that those goals were not achieved by the French drains in question. Thus, paragraphs 9 and 10 of Plaintiffs' First Amended Complaint, which read as follows, failed to be established by the McVicars in this matter.

> 9. In addition to the failure to follow the structural notes for the construction of the building, the defendants made no provision for rain gutters, thereby allowing all rain falling on the 31,200 square foot structure to drain directly onto the ground and not be diverted from the 8-inch slab supporting the building. The accumulation of water from rain will further weaken the structural integrity of the building.
>
> 10. In addition, the defendants regularly stall horses in the area between the eastern side of their building and the plaintiffs' property. The mixture of manure from the horses and the rain water drains off onto plaintiffs' property thereby causing a significant health hazard.

R Vol. I, p. 96.

The building had a foundation which averaged 37 inches in depth not 8 inches as alleged, and the French drains resolved the water runoff in the Fall of 2006.

Pile of Debris

The McVicars also made a complaint as to a pile of debris, but this was not pursued in court. Further, the trial court made the following finding:

70. At one time there was a pile of large debris to the west of the entryway to the building, but that area has been filled and now is a place to park trailers. *Plaintiffs' Exhibits 50, 54, 95.* Dr. Christensen also explained that debris was piled for purposes of filling a hole. The hole has since been filled and the area is now used for additional parking.

R Vol. II, pp. 250-251, ¶ 70 - Findings of Fact, Conclusions of Law, and Order.

Safety of Building

The safety of the building was primarily the focus of the trial.

The McVicars made an allegation that the building had an 8-inch foundation which would blow away in a 35 mph wind. This was information that they actually provided to their expert Mr. Stapley. Both allegations were proven to be totally unfounded. Mr. Bryce Stapley stated the following:

> 2. I have been informed that the footing was 10" wide and 8" deep for most of the building.

See Defendants' Trial Exhibit F.

Of course, this proved to be a falsehood perpetuated by the plaintiffs, but they did not care because then Mr. Stapley came up with the following conclusion:

> 8. This building would probably fail if exposed to a 35 mph wind loading a side of the building.

See Defendants' Trial Exhibit F.

Defendants' Trial Exhibit G is the letter from Mr. Garry Jones, the plaintiffs' then attorney, wherein he informed Mr. Stapley:

> The "foundation" is ten inches wide around the entire perimeter and approximately eight inches in depth--all above ground. The only exception to this is on the western side towards the northwest corner

where an approximately 30 foot wall was constructed which is 36 and 42 inches in height.

See Defendants' Trial Exhibit G.

R Vol. I, p. 156.

A great majority of the trial focused upon the safety aspect of the building. In condensing down all of the testimony, it primarily came down to a question of the volume of cement which anchored the building and whether or not it would be sufficient to keep the building from being damaged by an uplift in the wind. Additionally, the McVicars made allegations of the building posing a fire risk and a threat to the public. The trial court found as follows:

> Further, the Plaintiffs' reliance on the claim the building may be structurally unsafe or a fire hazard is not supported by clear evidence. There was conflicting testimony regarding the safety of the building, and no support for the argument that the public in general was in danger as a result of the construction of the building. Therefore, the Plaintiffs' contention of public nuisance fails. (Footnote omitted).

R Vol. II, p. 279 - Findings of Fact, Conclusions of Law, and Order.

> 101. Warren Watts, a consulting engineer, also reviewed the Coverall building plans. *Defendants' Exhibit B.* Based upon the delivery of eighty-eight yards of concrete, Watts determined the average depth of the foundation was thirty-seven inches. However, for purposes of calculations related to the dead load of the building, Watts conservatively applied a thirty inch average. Based upon Watts' calculations, he determined the building met or exceeded the requirements called for in the building plans. Watts testified that the building did not require a concrete slab floor, and that the building would resist forces shown on the plan without a floor. Watts observed holes as depicted in Defendants' Exhibit P.

R Vol. II, p. 259, ¶ 101 - Findings of Fact, Conclusions of Law, and Order. (The last sentence references holes dug so as to expose the true depth of the cement foundation of the building.)

103. Paul Duffau, a licensed home inspector, inspected the fabric building to determine whether there were safety concerns. Mr. Duffau noted there were no signs of stress in the steel structure. Further, Mr. Duffau stated that the building has performed adequately over a three year test of time. Within this time frame there is no evidence of strain on the building as a result of high wind events which have occurred in the area.

R Vol. II, p. 260, ¶ 101 - Findings of Fact, Conclusions of Law, and Order

110. Douglas Brown, a former fire fighter and Deputy Fire Chief for the City of Caldwell, Idaho, also testified regarding the fire safety of the building. Mr. Brown believed the building is exempt from building code requirements because it is an agricultural building. Mr. Brown testified that storing hay within the building helped keep moisture from the hay, which was useful to lower the risk of spontaneous combustion. In addition, in comparison to outdoor hay storage, the building would contain a fire and act to prevent wind from spreading a fire. Mr. Brown testified regarding the advantages of a fabric building as compared to a wood building in the event of a fire. In a fabric building the membrane simply disintegrates, whereas wooden buildings fuel a fire. Also, membrane covers allow firefighters to attack a fire more directly because it is easier to see and locate the fire. The membrane would also act as a fire barrier if a fire was started in an adjacent wheat field.

R Vol. II, pp. 261-262, ¶ 110 - Findings of Fact, Conclusions of Law, and Order.

Value of Property

The McVicars have testified that their property has been diminished in value, but the Nez Perce County appraisal and tax assessments for their property showed an increase in value to both the McVicars' and the Christensens' properties. Mr. Terry Rudd's (an appraiser hired by the McVicars) testimony rested upon adopting as truth all of Mrs. Julie McVicars' diary. Mr. Rudd's diminishment in value was then trumped by Ms. Jennifer Menegas, a local Realtor who testified she could actually sell the McVicars' property at an amount that would exceed Mr. Rudd's pre-nuisance

value. Not only would the amount she testified she could sell it at exceed Mr. Rudd's value, but it would by far exceed the tax appraisals in regard to the McVicars' property which showed a reasonable growth in value from 2003 to 2010 uninterrupted by the placement of the building in question. *See* Defendants' Trial Exhibit M.

ARGUMENT

The above factual discussion and references to factual findings by the trial court and the underlying record clearly establish that the Christensens have gone about their business and the treatment of their animals and land in a manner that is totally consistent with the Tammany Creek area. They have embraced the desires of the Tammany Creek residents by providing the sale of hay to the local residents.

There was even testimony in the underlying record where hay was provided by the Christensens to individuals too poor to properly feed their horse. The Christensens allowed use of their property for 4-H projects in order to allow children of the Lewiston area to experience what it is like to feed and tend animals.

When the McVicars would make complaint, the Christensens tried to respond.

When the McVicars complained about water runoff, the Christensens went to a lot of time, trouble, cost, and effort to install the French drains along each side of the building so that the water did not go toward the McVicars' property.

When the McVicars complained about debris, the Christensens accelerated what they were doing and filled in the hole. Now, as the trial court indicated, the space is used for additional parking.

When the McVicars complained about noise, even though the Christensens felt it was unwarranted, the Christensens purchased a decibel meter in order to limit the noise to the point where investigative officers found it quite acceptable.

When the McVicars complained about the dust, the Christensens put washed gravel upon the land in front of the building and also planted saplings along the border to minimize the drift. When the McVicars complained to the DEQ, the DEQ's investigative officer found no "fugitive dust"escaping to the McVicars premises even though it was the McVicars who called them to investigate. When counsel for the McVicars cross-examined the DEQ officer with a photograph, the officer pointed out that the very picture was an indicator of dust, but not "fugitive dust." Tr Vol. I, p. 461, LL. 17-25; p. 462, LL. 1-12. The pictures presented by the McVicars to the DEQ confirmed the same.

The McVicars complained about how the Christensens treated their animals and the smell from manure. Subsequently, Ms. Amity Larsen was called to the premises on multiple occasions to investigate. She testified that the animals were very well cared for and that any manure smell was minimal at best. Additionally, the Christensens moved any manure piles away from the McVicars home down toward their own home simply to avoid complication. Tr Vol. II., p. 1166, LL. 22-25; p. 1167, LL. 1-4.

The McVicars operated their construction business from their home and outlying buildings and then in 2003 started a granite refining business which continued from then into 2008 with no reassurance to the trial court or anyone else that the silica created as a result of that process was not a threat to the Christensens and their children, or to other residents of the area. Tr Vol. I, pp. 534, LL. 20-25; p. 535; p. 536, LL. 1-14.

The McVicars complained about the light emanating from the building, but with only a couple of exceptions throughout the years, the lights within the building were off by 10:00 p.m. The only exceptions being an instance where Dr. Christensen ran out of patience and became exasperated with the repeated complaints of the McVicars and an instance where some mares were giving birth and a bank of lights had to be left on so they would not trample their young. Tr Vol. II, p. 1274, LL. 19-24.

LEGAL ARGUMENT

The case law relied upon by the McVicars in this matter is simply not applicable to the facts of this case. Not only are the facts of this case easily distinguishable, but the facts of this case cry out for the opposite result.

Instead of being repulsed by a cattle feedlot, a farrow-to-finish hog operation, sheep grazing and herding, or commercial fertilizer plant, the local residents of Tammany Creek testified, person after person after person, as to how well the Christensens treated their animals, how well maintained they kept their property, and how attractive they kept their premises as a whole.

Payne v. Skaar, 127 Idaho 341, 900 P.2d 1353 (1995) - Citizens and city filed complaint against property owner claiming that cattle feedlot constituted public and private nuisance.

Crea v. Crea, 135 Idaho 246, 16 P.3d 922 (2000) - Neighbors brought suit seeking determination that expanded farrow-to-finish hog operation was private nuisance.

Sweet v. Ballentine, 8 Idaho 431, 69 P. 995 (1902) - It is a trespass for the owner, or person having the charge of sheep, to graze or herd them within two miles of the dwelling of another.

McNichols v. J. R. Simplot Co., 74 Idaho 321, 262 P.2d 1012 (1953) - Action to abate commercial fertilizer plant as nuisance and for damages for loss of business and depreciation due to operation of plant, and for injunction perpetually enjoining operation of plant.

Hansen v. Indep. Sch. Dist. No. 1 in Nez Perce County, 61 Idaho 109, 98 P.2d 959 (1939) - injunction against the leasing of an athletic field.

Corp. of Presiding Bishop of Church of Jesus Christ of Latter Day Saints v. Ashton, 92 Idaho 571, 448 P.2d 185 (1968) - Suit to restrain city from issuing building permit to church and to restrain church from maintaining a lighted recreation field in residential zone.

The area in question is not some type of pristine residential community suddenly interrupted by a baseball field being plunked down next to it. Rather, it is an agricultural community that has as its personality and character agricultural uses of horses, cattle, farms, and, with particularity, the use that the Christensens have made of the property.

The prior use made by the previous owner and the prior use made by the Christensens, which the McVicars found totally acceptable, was pasture land with over 50 horses roaming the land

immediately behind the McVicars property. R Vol. II, p. 7, ¶ 16 - Findings of Fact, Conclusions of Law, and Order.

The trial court specifically found, and Dr. Christensen specifically testified, that he conferred with Mr. John McVicars prior to the construction of his building. Mr. McVicars stated he was totally agreeable and acceptable to an outdoor riding area. Thus, the McVicars were totally agreeable to an outdoor riding arena that would have contemplated lights, dust just like the rodeo arena East of them and the riding arena North of them, and a sound system.

Now, the McVicars are asking this Court and the trial court to accept that simply because the riding arena is covered, and they did not realize such, that the Christensens' use suddenly becomes a nuisance.

The covered building contains the dust and minimizes the glare of any lights that would have been emitting from an open arena as originally contemplated by Mr. McVicars. Does the containment of such dust and light turn the usage of the Christensens' property into a nuisance?

The McVicars had operated their construction business from their property and then after 2003 initiated the granite business from their property which involved not only the manufacturing of the granite but the selling of the granite. The McVicars want to make complaint about the Christensens' use of the property, but they operated a construction business and a granite business on their property across the street from a rodeo arena and a riding arena, both of which are open to the public, have bright lights, and sound systems.

What the McVicars are asking this Court to find is that their (the McVicars) definition of what they like or dislike should define what is a private nuisance as opposed to someone objectively looking at the totality of the facts.

As noted above, the Defendants' Trial Exhibit K, which is the McVicars' petition to the District Court for review of the Decision of the Nez Perce County Commissioners, Exhibit A thereto, which specifically addresses the dust issues and the impact of hay sales as to the McVicars. The County Commissioners held a public hearing on the McVicars' appeal of the Conditional Use Permit issued to the Christensens. The Commissioners considered "all information, oral or written, that was received at the time and place of the public hearing as presented by the Appellant, the Applicant, and other interested persons." They considered the Nez Perce County's Comprehensive Plan which states as its goal "is to retain a strong agricultural land use base to support the agrarian economy and protect the rural character of Nez Perce County."

The Commissioners then modified the permit to the Christensens upon the following conditions:

> *a. Annual application of dust abatement to the drive-way that is situated between the two parcels leading to the building.*
> *b. Proof of purchase and proof of application for the dust abatement provided to Nez Perce County Planning and Building and kept on file with the Conditional Use Permit.*
> *c. Limited hours of hay sales operation to Monday through Saturday, 7 am to 7pm, with no delivery or sale of hay on Sundays.*

5. Any violation of the conditions and terms of the Conditional Use Permit may result in the revocation of the Conditional Use Permit to sale hay on this property.

See Defendants' Trial Exhibit K, Exhibit A, p. 3-4.

Thus, the McVicars were able to have their complaints heard by the public entity which is authorized to deal with their complaints and their issues. How can the activity complained of be a nuisance when the governmental authority authorized to deal with exactly that issue rules that the hay sales are not only lawful but consistent with the area, the desires of the residents, and the Nez Perce County's Comprehensive Plan subject to reasonable limitations as to dust abatement and hours of operations?

Right to Farm Act

Idaho Code § 22-4501 reads in part, "It is the intent of legislature to reduce the loss to the state of its agricultural resources by limiting the circumstances under which agricultural operations may be deemed to be a nuisance. The legislature also finds that the right to farm is a natural right and is recognized as a permitted use throughout the State of Idaho."

The trial court also discussed the Right to Farm Act, Idaho Code § 22-4501 et seq., and attempted to extrapolate the legislative intent from the statute. R Vol. II, pp. 279-281 - Findings of Fact, Conclusions of Law, and Order. To be fair to the trial court, the legislative intent has been more clearly stated after the trial court's opinion was rendered. Idaho Code § 22-4502 which was adopted after the trial now provides a much clearer indication of the legislative intent in situations such as the one at hand. Idaho Code § 22-4502 reads as follows:

(1) "Agricultural facility" includes, without limitation, any land, building, structure, ditch, drain, pond, impoundment, appurtenance, machinery or equipment that is used in an agricultural operation.

(2) "Agricultural operation" means an activity or condition that occurs in connection with the production of agricultural products for food, fiber, fuel and other lawful uses, and includes, without limitation:

(a) Construction, expansion, use, maintenance and repair of an agricultural facility;

(b) Preparing land for agricultural production;

(c) Applying pesticides, herbicides or other chemicals, compounds or substances labeled for insects, pests, crops, weeds, water or soil;

(d) Planting, irrigating, growing, fertilizing, harvesting or producing agricultural, horticultural, floricultural and viticultural crops, fruits and vegetable products, field grains, seeds, hay, sod and nursery stock, and other plants, plant products, plant byproducts, plant waste and plant compost;

(e) Breeding, hatching, raising, producing, feeding and keeping livestock, dairy animals, swine, fur-bearing animals, poultry, eggs, fish and other aquatic species, and other animals, animal products and animal byproducts, animal waste, animal compost, and bees, bee products and bee byproducts;

(f) Processing and packaging agricultural products, including the processing and packaging of agricultural products into food and other agricultural commodities;

(g) Manufacturing animal feed;

(h) Transporting agricultural products to or from an agricultural facility;

(i) **Noise, odors, dust, fumes, light** and other conditions associated with an agricultural operation or an agricultural facility;

(j) Selling agricultural products at a farmers or roadside market;

(k) Participating in a government sponsored agricultural program.

(3) "Nonagricultural activities," for the purposes of this chapter, means residential, commercial or industrial property development and use not associated with the production of agricultural products.

> (4) "Improper or negligent operation" means that the agricultural operation is not undertaken in conformity with federal, state and local laws and regulations or permits, and adversely affects the public health and safety.

I.C. Ann. § 22-4502 (West) (emphasis added).

Paragraph 4 of the above-definition specifically states that "'Improper or negligent operation' means that the agricultural operation is not undertaken in conformity with federal, state and local laws and regulations or permits, and adversely affects the public health and safety." It should be noted in this matter that the trial court specifically found that a public nuisance was not established, and, additionally, the building in question was not established as being inadequately constructed or a threat to the safety of others.

Paragraph 2(a) contemplates that an agricultural operation might require "construction, expansion, use, maintenance and repair." The trial court did not recognize expansion in an existing agricultural area as a consideration of the RTFA, but rather it only contemplated the avoidance of encroaching urban areas. The legislative intent of RTFA clearly considered the complications of a private nuisance allegation when it updated Idaho Code § 22-4502 to include terms such as "construction" and "expansion." Further, it recognized that an agricultural operation typically includes "noise, odors, dust, fumes, [and] light."

The Legislature clarified its legislative intentions concerning agricultural activities in this state. Idaho Code § 22-4505 reads as follows:

(1) An agricultural operation, agricultural facility or expansion thereof shall not be found to be a nuisance under the circumstances described in section 22-4503, Idaho Code.

(2) An agricultural operation, agricultural facility or expansion thereof that is operated in accordance with generally recognized agricultural practices or in compliance with a state or federally issued permit shall not be found to be a public or private nuisance. The provisions of this subsection shall not apply when a nuisance results from the improper or negligent operation of an agricultural operation, agricultural facility or expansion thereof.

I.C. Ann. § 22-4505 (West) (emphasis added).

DISCUSSION OF ISSUES ON APPEAL

A. That the District Court erred when it concluded and ordered that the Christensens' use of their property west of the McVicars' home constitutes a private nuisance, and in addition that the Right to Farm Act and the clean hands doctrine do not apply.

The trial court found that the Christensens' use of the property West of the McVicars' home constitutes a private nuisance and that the Right to Farm Act and the clean hands doctrine do not apply. For the factual reasons and legal arguments set forth above, such finding should be reversed on appeal.

B. That the District Court erred when it ordered the Christensens to relocate their building and centralize their horse operation at a different location upon their property, said remedy is in error given the applicable facts and law.

In ordering the Christensens to relocate their building and centralize their horse operations at a different location upon their property, the trial court is so ordering due to the fact that it has declared that the building and the Christensens' use of the property West of the McVicars' property

constitutes a nuisance. For the factual reasons and legal arguments set forth above, such finding should be reversed on appeal. Said remedy is in error given the applicable facts and law.

C. That the District Court erred when it ordered that the Christensens limit traffic on the property west of the McVicars' property and that the only vehicles which are personally owned by the Christensens may drive on the property that lies west of the McVicars' property, and in addition that the Right to Farm Act and the clean hands doctrine do not apply. In addition, said remedy is in error given the applicable facts and law.

The trial court ruled that the only vehicles which are personally owned by the Christensens may drive upon the property which lies West of the McVicars' property and limit their usage of such, this will impact hay sales. The Christensens applied for their permit with Nez Perce County which was granted, and then the McVicars appealed that decision. The Nez Perce County Commissioners affirmed the granting of the permit by the Planning and Zoning department. Tr. Vol. II, p. 1198, LL. 18-25. The McVicars appealed the matter to the District Court from there. *See* Defendants' Trial Exhibits K and L. If the rulings of the government authorities in regard to hay sales allow the Christensens to perform hay sales from the building in question, then such lawful activity should not be defined as a nuisance. As described above, the building actually acts as a dust and noise buffer to the McVicars because the trucks, etc., can drive into the building in order to load and unload hay.

The acreage "West of the McVicars' property" is a flat area of land that is quite substantial and valuable to the overall operations of the Christensens' horse farm and hay sales.

D. That the District Court erred when it ordered a mandatory injunction requiring the Christensens to remove the fabric building from its current location on Christensens' property by no later than August 1, 2011 and in addition that the Right to Farm Act and the clean hands doctrine to not apply. In addition, said remedy is in error given the applicable facts and law.

The trial court ordered the Christensens to move the fabric building from its current location and that said ruling, based upon the factual discussion and legal argument above, should be reversed on appeal.

E. That the District Court erred when it did not find that the McVicars should reimburse the Christensens for their attorney fees and costs incurred in regard to the successful defense of the public nuisance claim and the issue of the building being unsafe or a fire hazard, i.e., its structural integrity and that it did not meet the applicable building code; of which fees and costs associated therewith are recoverable.

The attorney fees and costs which are being appealed in this matter primarily relate to the fact that the McVicars made various allegations in regard to the construction of the building that were either inaccurate or false. The time, trouble, and expense that went to defending against those claims in regard to the safety aspects of the building was consuming, not only in regard to the time allotted at trial, but in regard to trial preparation and the expert witnesses that were called in regard to defend against those claims. It also impacted pretrial motions, etc. It is believed by the Christensens that the factual situation in this matter is unique because of the nature of the McVicars' unfounded allegations that resulted in them having to defend themselves that attorney's fees and costs in regard thereto should be reimbursed. This same argument does not apply to the defense of the public nuisance claim, because in all candidness to this Court, trying to separate the legal effort and costs associated with defending against the public nuisance claim versus the private nuisance claim would

not be able to be done in a truthful and accurate manner other than simply dividing the attorney's fees and costs in an even manner.

CONCLUSION

As shown above, the trial court set forth specific findings in relation to the uses by the Christensens concerning their property, the past owner's uses, and what the uses were in the area surrounding the Christensens' property, all of which indicate that the Christensens were not creating a nuisance.

Lifestyles are a matter of choice. If an individual wants to have a say as to how his or her neighbor builds their home and conducts themselves upon their property, they live in a residential area that has covenants and ordinances which protect their desires in that regard.

But, again, lifestyles are a matter of choice. As can be gleaned from the testimony of the people of the Tammany Creek area, it is clear that horses, livestock, hay, buildings, and activity come with their lifestyle. It is simply a part of the agricultural scene, but also a part of a rural or agricultural culture. The people of the Tammany Creek area have carved out a lifestyle that is appropriate and really quite beautiful. The conscientiousness and conduct of the Christensens is beyond question and beyond reproach.

The McVicars were able to have their complaints heard by the public entity which is authorized to deal with their complaints and their issues as to hay sales. The governmental authority authorized to deal with exactly their issues ruled, afer a public hearing, that the hay sales are not

only lawful but consistent with the area, the desires of the residents, and the Nez Perce County's Comprehensive Plan subject to reasonable limitations as to dust abatement and hours of operations.

If the size of the building is the determining factor as to what constitutes a nuisance in an agricultural area, then barns, grain bins, silos, buildings big enough to repair a combine in the winter (machine shops), garages, and hay and grain storage buildings all become suspect. The Christensens were compliant with the appropriate governmental regulations and authorities. They conferred with their neighbors. Their treatment of their animals and care of their land and buildings excels in regard to the immediate vicinity around their home and the Tammany Creek community as a whole.

The construction of the building in question and the conduct of the Christensens is totally consistent with the applicable laws, the entire Tammany Creek area, the immediate vicinity surrounding the homes in question, and even the prior use made by the seller to the Christensens.

The Christensens will never be able to appease the McVicars. Thus, by definition, the Christensens' conduct and construction cannot be a nuisance, simply because the McVicars object to the lifestyle of the Tammany Creek area when it is situated on an adjacent property to their own.

RESPECTFULLY SUBMITTED on this 6th day of April, 2012.

Charles A. Brown
Attorney for Appellants.

I, Charles A. Brown, hereby certify that two (2) true and correct copies of the foregoing were:

☑	mailed by regular first class mail, and deposited in the United States Post Office to:	Ronald J. Landeck, Esq. Landeck & Forseth Attorneys at Law 693 Styner Avenue, Suite 9 P.O. Box 9344 Moscow, ID 83843
☐	sent by facsimile to:	
☐	sent by facsimile and mailed by regular first class mail, deposited in the United States Post Office to:	
☐	sent by Federal Express, overnight delivery	
☐	hand delivered to:	

on this 6th day of April, 2012.